

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

<b>IN THE MATTER OF:</b>	)	<b>Administrative Cause</b>
	)	<b>Number: 14-0002A</b>
<b>READOPTION OF 312 IAC 3:</b>	)	
<b>ADJUDICATORY PROCEEDINGS</b>	)	<b>(LSA Document #14-27(F))</b>

**RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULE**

**A. INTRODUCTION**

For consideration is the readoption of 312 IAC 3, which assists with the implementation of proceedings governed by IC 4-21.5 (commonly known as the “Administrative Order and Procedures Act” or “AOPA”). The rules set forth procedures and requirements regarding requests for administrative review and the conduct of those reviews. The text of 312 IAC 3 can be accessed through the Indiana General Assembly’s website at: [www.in.gov/legislative/iac/T03120/A00030.PDF](http://www.in.gov/legislative/iac/T03120/A00030.PDF).

312 IAC 3 is proposed to be readopted in its entirety and without amendment. Under 312 IAC2-2-4(b), if rules are readopted in their current form without amendments, the Director of the Division of Hearings may approve preliminary action. The Natural Resources Commission (the “Commission”) retained authority for final action on readoptions.

The Director of the Division of Hearings approved preliminary action on January 13, 2014. The standard practice is to readopt rules by article, and 312 IAC 3 is now submitted for consideration as to final action.

**B. READOPTION ANALYSIS REQUIRED UNDER IC 4-22-2.5-3.1 AND IC 4-22-2.1-5**

Jennifer Kane, with the Commission’s Division of Hearings, was appointed as Small Business Regulatory Coordinator for this rule readoption. Kane provided the following analyses of potential impacts to small business for the proposed readoption of 312 IAC 3:

**SMALL BUSINESS IMPACT STATEMENT (EIS)**

REVIEW UNDER IC 4-22-2.5-3.1

**The continued need for the rule.**

312 IAC 3 assists with implementing proceedings governed by IC 4-21.5 (the “Administrative Orders and Procedures Act” or “AOPA”) for which the Natural Resources Commission (the “Commission”) or a Commission administrative law judge is the ultimate authority. The rules set forth procedures regarding requests for administrative review and the conduct of those reviews. In some instances, the sections are required as elements of Indiana implementation of federal regulatory programs (examples, 312 IAC 3-1-5 for show cause orders, 312 IAC 3-1-13 for awards of litigation expenses, and 312 IAC 3-1-17 for records of proceedings under the Surface Mining Control and Reclamation Act). Other provisions are required to implement directives from the Indiana General Assembly (example, 312 IAC 3-1-10.5 for consolidation of proceedings) or to clarify and streamline adjudicatory processes (examples, 312 IAC 3-1-2 for delegations from the Commission to address dismissals and to facilitate the approval of settlement agreements; 312 IAC 3-1-10 incorporation of the Indiana Trial Rules or the Rules of Evidence to help address vexing litigation disputes; and 312 IAC 3-1-18 to identify service upon the agency and the ultimate authority). There is a continued need for the rules.

**The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rule’s implementation by the agency.**

AOPA and 312 IAC 3 are by their nature elements for providing due process and dispute resolution. Rulings by the Commission and its administrative law judges are likely to be viewed with disappointment by at least one litigant. Outside of the ordinary application of an adjudicatory process, however, the Commission has not received any complaints or comments from the public, including small businesses, concerning these rules or the implementation of these rules.

**The complexity of the rule, including any difficulties encountered by:**

- (A) the agency in administering the rule; or**
- (B) small businesses in complying with the rule.**

The Commission has refined administration of its rules and works with small businesses, private individuals, and professionals in complying with its rules. 312 IAC 3 does not conflict with other federal, state or local laws and is an appropriate implementation of state statute. These rules are procedural in nature.

**The extent to which the rule overlaps, duplicates, or conflicts with other federal, state, or local laws, rules, regulations, or ordinances.**

These rules do not overlap with or duplicate other federal, state, and local laws.

**The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency, and the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule since that time.**

312 IAC 3 has been amended twice since its readoption effective 2008 (LSA Document #08-52(F)). (1) In 2009, LSA Document #08-688(F) amended 312 IAC 3-1-1, 312 IAC 3-1-2, and added 312 IAC 3-1-8 and 312 IAC 3-1-10.5 concerning procedural rules for the Natural Resources Commission, Division of Hearings, to provide for the consolidation of proceedings with the Office of Environmental Adjudication as required by SEA 134. (2) In 2011, LSA Document #10-162(F) amended 312 IAC 3-1-2.5, which identified provisions of the code of judicial conduct that were applicable to administrative law judges of the Natural Resources Commission under IC 14-10-2-2, to accommodate amendments received from the Indiana Supreme Court through October 15, 2009. The amendment also allowed administrative law judges to provide mediation services in matters in addition to those under IC 4-21.5-3.5. The amendments under LSA Document #08-688(F) and LSA #10-162(F) did not impose a requirement or cost on small businesses.

In the process of conducting its business, the Commission is continually reviewing its effectiveness in providing standards and guidance to small businesses, private individuals, and professionals in complying with its rules. Technology, economic conditions, and other factors have not changed in a way that would warrant modification to 312 IAC 3.

#### **MOST RECENT SMALL BUSINESS IMPACT ANALYSES**

##### Review under IC 4-22-2.1-5

**The degree to which the factors analyzed in a previous economic impact statement have changed since the statement was prepared.**

In 2009, LSA Document #08-688(F) amended 312 IAC 3-1-1, 312 IAC 3-1-2, and added 312 IAC 3-1-8 and 312 IAC 3-1-10.5 concerning procedural rules for the Natural Resources Commission ("Commission") to provide for the consolidation of proceedings with the Office of Environmental Adjudication as required by IC 14-10-2-2.5.

The Economic Impact Statement (IC 4-22-2.1-5) prepared for the rule amendments (posted as 20081210-IR-312080688EIA) stated the following:

The rule implements P.L.84-2008. The legislation provides an opportunity for parties to adjudications, pending before the Office of Environmental Adjudication and the Natural Resources Commission (Division of Hearings), to consolidate proceedings pertaining to water quality or water quantity. Although what is sometimes called "overlapping jurisdiction" between these agencies (effectively, between the Indiana Department of Environmental Management and the Department of Natural Resources) is uncommon, in any such adjudication where a small business is a party, the small business could be subject to the rule.

No requirement or cost is imposed on a small business by this rule.

In 2011, LSA Document #10-162(F) amended 312 IAC 3-1-2.5, which identified provisions of the code of judicial conduct that were applicable to Commission administrative law judges under IC 14-10-2-2, to accommodate amendments received from the Indiana Supreme Court through October 15, 2009. The amendment also allowed administrative law judges to provide mediation services in matters in addition to those under IC 4-21.5-3.5. The amendments under LSA Document #08-688(F) and LSA #10-162(F) did not impose a requirement or cost on small businesses.

The Economic Impact Statement (IC 4-22-2.1-5) prepared for the rule amendments (posted as 20100922-IR-312100162EIA) stated the following:

There are no small businesses subject to this rule.

In 2007, the rule was amended to require the two administrative law judges for the Natural Resources Commission to comply with the "applicable provisions of the code of judicial conduct". These 2007 amendments were processed in conjunction with parallel rules that govern the two environmental law judges for the Office of Environmental Adjudication. The revisions had subtle and mostly minor consequences for exemptions established in 2007 by 312 IAC 3-1-2.5. In 2009, the Indiana Supreme Court revised the Code of Judicial Conduct. The enumerations of the Canons set forth in the Code of Judicial Conduct were reordered.

An additional aspect of the proposal is that an administrative law judge would be authorized to perform mediations governed by AOPA in the ordinary course of employment and, without a fee, mediations governed by the courts. The proposed rule would govern activities of the four employees of the Commission's Division of Hearings but has most direct impact upon its two administrative law judges.

There has been no change in the factors analyzed in the previous economic impact statements since those statements were prepared.

**Any regulatory alternatives included in the statement under IC 4-22-2.1-5(a)(5)**

The amendments in 2008 and 2011 were found not to impose costs or requirements on small businesses. There were no regulatory alternatives included in the Economic Impact Statements associated with LSA Document #08-688(F) or LSA Document #10-162(F).

**Any regulatory alternatives not considered by the agency at the time the statement was prepared could be implemented to replace one (1) or more of the rule's existing requirements**

312 IAC 3 assists with implementing proceedings governed by IC 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act"). The rules set forth procedures and requirements regarding requests for administrative review and the conduct of those reviews. There are no alternatives to be considered for implementation of these rules.

Executive Order 13-03 required agencies to "suspend rulemaking action on any proposed rules for which a notice of intent to adopt a rule...was not submitted to the office of the *Indiana Register* on or before January 14, 2013." These requirements were restated, along with additional compliance information, in Financial Management Circular 2013-01. On May 2, 2013 Christopher D. Atkins, Director, Office of Management and Budget, wrote to all agency heads stating the moratorium in Executive Order 13-03 was inapplicable to readoptions and that an exception did not need to be sought or received.

As specified by Executive Order 2-89 and Financial Management Circular 2010-4, fiscal analyses of the rule readoption proposal were submitted, along with a copy of the

proposed rule language and a copy of the posted Notice of Intent to Readopt a Rule, to the Office of Management and Budget and to the Administrative Rule Oversight Committee, on February 14, 2014. By letter dated March 20, 2014, Brian E. Bailey, Director, State Budget Agency, recommended the proposed rule readoption be approved.

**C. NOTICE OF INTENT TO READOPT AND RECOMMENDATION FOR FINAL ACTION**

On February 5, 2014, the “Notice of Intent to Readopt” 312 IAC 3 was posted to the *Indiana Register* at 20140205-IR-312140027RNA as anticipated by IC 4-22-2.5-2 and IC4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 3 without changes. The notice also provided a person had 30 days to submit a written request to the Commission, through the Small Business Regulatory Coordinator, seeking to have a particular section of the rule readopted separately. If a request had been made, the Commission would have been required to complete the full rule adoption process for the section requested to be readopted separately.

No written request was received. The Commission may either submit the rule for filing with the Publisher under IC 4-22-2-35 or elect the procedure for readoption under IC 4-22-2. The hearing officer recommends the Commission approve for readoption 312 IAC 3, without amendment, for subsequent filing with the Publisher.

Dated: April 7, 2014

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Jennifer M. Kane  
Hearing Officer